Practical Failures in Maltese Building Regulation Resulting from Parallel Public and Civil Law Regimes in the Realm of Rock Excavation

DANIKA CUTAJAR

In this article, **Danika Cutajar** analyses the inconsistencies and anachronisms of the legal regime regulating the building and construction industry due to conflicting public and civil law regimes. It is an abridged version of the author's LL.B. (Hons.) dissertation and reflects the legal position obtaining at 30th August 2022.

TAGS: Civil law; Servitudes; Public law; Rock excavation

Danika Cutajar recently graduated from the University of Malta with an LL.B. and is currently reading for a Master of Notarial Studies degree. Her research interests broadly fall under the larger field of civil law, particularly property law.

OLJ
ONLINE LAW JOURNAL

1. Introduction

Building development in Malta, and the consequent limitation of land area, necessitated erections of high-rise structures and underground construction, leading to large-scale excavations - an operation widely susceptible to various potential risks and liabilities. Excavation-related incidents - commonly characterised by structural failure and cave-ins - continue to plague the local building and construction industry pointing to the long-standing need for regulation of the sector.

The recently-established Avoidance of Damage to Third Party Property Regulations (L.N. 136 of 2019) and its subsequent amendments are the prevalent pieces of legislation regulating rock excavation taking place in the vicinity of third-party property, demolition works, and the construction of additional storeys, walls, or structures overlying existing tenements.

The Regulations define '*excavation*' as, '*the cutting or removal of rock, clay and any other natural or human placed material, that forms part of the land, or the removal of any consolidated material*'.[1] However, barring the introduction of preliminary documentation requirements, such as the works method statement and condition report, outlining the methodology of the proposed works and the condition of buildings adjacent to the site, the Regulations fall short in adequately regulating excavation works.

2. Article 439 of the Civil Code

In default of coherent laws regulating excavation, Article 439 of the Civil Code operates as a gap-filling provision. It stipulates that: '*It shall not be lawful for any person to dig in his own tenement, any well, cistern or sink, or to make any other excavation for any purpose whatsoever at a distance of less than seventy-six centimetres from the party-wall*'.[2] The provision thus precludes any excavation works within a seventy-six centimetre distance from the party-wall.

Sir Adrian Dingli modelled Article 439 on Article 261 of the Codice Ticino, reading as follows - '*La fossa per lo scolo delle acque in confine dell'fondo altrui, non può farsi se non alla distanza dal fondo del vicino corrispondente alla profondità della fossa*'.[3] As observed by the First Hall of

[1] Avoidance of Damage to Third Party Property Regulations, S.L. 513.06, Regulation 3.

[2] Civil Code, Chapter 16 of the Laws of Malta, Article 439.

[3] Codice della Repubblica e Cantone del Ticino, Libro Secondo, Titolo VI, Articolo 261. '*The pit for the drainage of the water in the boundary of the bottom of others, can only be done at the distance from the bottom of the neighbour corresponding to the*

the Civil Court in *A&N Properties Limited et vs Charles Busuttil*, the relevance of this source

> *[j]insab fil-projbizzjoni ċara u assoluta ta' tħaffir f'distanza anqas minn dik stipulata*'.[4] The Court further noted the peculiar choice adopted by the legislator: '*Interessanti kif Sir Adriano Dingli għażel li jaddotta din il-projbizzjoni assoluta, bl-għeruq tagħha fid-dritt Ruman, u mhux ir-regola aktar flessibbli addotata f'kodiċijiet kontemporanji oħra, fosthom il-Code Napoleon u l-Kodiċi Ċivili Taljan tal-1865*'.[5]

Article 674 of the Napoleonic Code stipulates that the works shall be executed in such a manner as to '*avoid injury to his neighbour*'.[6] On the other hand, the Italian Civil Code of 1865 held that for excavation works, a distance, equal to the depth of such excavations measured from the boundary-line, should be observed, unless local regulations prescribed a greater distance. Having said that, Article 577 then stipulated that the legal distance need not be observed, provided that during the execution of the works, all suitable measures are undertaken to prevent any potential damage - '*tutte le opere atte ad impedire ogni danno*'.[7]

The Courts consistently stress that the rationale underlying Article 439 of the Civil Code is the safety and protection of adjacent tenements against damage.

In *A&N Properties Limited et vs Charles Busuttil*,[8] the defendant had excavated within the minimum statutory distance. Plaintiff subsequently instituted proceedings against the defendant, who asserted that the works were carried out within the said distance with the object of strengthening the foundation of the party-wall by reinforcing concrete piles adjacent to the common-wall. Defendant insisted:

> *[D]in is-servitù hija restrizzjoni fuq l-użu leġittimu tal-proprjetà u għandha tingħata interpretazzjoni restrittiva l-aktar fejn jinsab pruvat li n-naħa l-oħra ma sofriet ebda ħsara jew inkonvenjent*.[9]

Notwithstanding this, the Court upheld that: '*[I]l-liġi qed tippreżumi iuris et de iure li kwalunkwe tħaffir f'distanza anqas minn dik imsemmija*

depth of the pit'.

[4] '*[the relevance of this source] lies in the clear and absolute prohibition of excavation at a distance less than that laid down*'.

[5] '*It is interesting how Sir Adriano Dingli chose to adopt this absolute ban, rooted in Roman law, and not the more flexible rule adopted in other contemporary codes, including the Napoleonic Code and the Italian Civil Code of 1865*'.

[6] The Code Napoleon; or The French Civil Code (literally translated from the original and official edition, published at Paris, in 1804). '*He who causes a well or a cesspit to be dug near a wall partition, he who wishes a chimney to be built there, or a hearth, a forge, or oven, or a kiln, to build a stable against it, or to form against such wall a heap of corrosive substance, is obliged to leave the distance prescribed by particular regulations and usages on the subject, or to form the works prescribed by the same regulations and usages, in order to avoid injury to his neighbour*'.

[7] Article 575-577, Codice Civile del Regno D'Italia (1865).

[8] 763/2009 *A&N Properties Limited et vs Charles Busuttil*, Civil Court (First Hall) 29 February 2012, 14.

[9] ' *[T]his easement is a restriction on the lawful use of property and must be given a restrictive interpretation, especially where it is proved that the other party has not suffered any harm or inconvenience*'.

tippreġudika s-sigurtà tal-binjiet adjaċenti għad-detriment tal-viċini.[10]

The Civil Court cited the judgement delivered in *Joseph Mangion vs Julian Borg*:[11]

> *Il-leġislatur stabbilixxa d-distanza ta' żewġ piedi u sitt pulzieri presumibilment għaliex huwa kkalkola li dik id-distanza kienet tkun biżżejjed biex jiġu evitati d-danni. Dik id-distanza* [...] *għandha dejjem tiġi osservata* [...] *għalhekk wieħed ma jistax jargumenta* [...] *li biex tinvoka l-applikazzjoni tad-distanza legali ta' żewġ piedi u sitt pulzieri, l-ewwel trid tipprova l-eżistenza tal-ħsara, billi dan il-liġi ma qalitux*.[12]

The Courts have reiterated that any satisfactory evidence, showing that excavation within the statutory distance would not prejudice third-party property, would not suffice to do away with the prohibition laid down in Article 439.

The Chamber of Architects expressed their objections to the judicial stance and argued that the provision sets out a legal easement for private utility in favour of the adjacent tenement. Akin to other servitudes, the right can be renounced by virtue of a public deed between the owners of the neighbouring tenements or otherwise by extinctive prescription. This was confirmed in *Salvatore Vella vs Felice Camilleri*:[13] '*id-distanza tikkonstitwixxi servitùlegali għall-utilità privata; u għalhekk l-istess distanza tista' tiġi modifikata, u għall-bżonn rinunzjata*'.[14] More recently, in *Philip Bonello et vs Gaetano Tabone et*,[15] the Court of Appeal held that renunciation of the easement: '*ma jseħħx biss bit-trapass ta' tletin sena,* [...], *iżda fost metodi oħra ta' estinzjoni hemm ukoll ir-rinunzja li tista' tkun espressa jew taċita*'.[16] The Chamber argues that this possibility of renunciation or modification to the easement would be illogical if the intention of the legislator was for this legal easement to regulate the excavation process and serve public utility and safety, and hence cannot be construed as such.[17]

One must also consider that the provision came into effect in 1868, when large-scale excavations were not particularly common nor necessary, given that at the time there was ample space for development. Moreover, there

---

[10] '*[T]he law presumes iuris et de iure that any excavation at a distance less than that said would prejudice the safety of the adjacent buildings to the detriment of the neighbours*'.

[11] *Joseph Mangion vs Julian Borg*, Civil Court (First Hall) 3 February 1983.

[12] '*The legislator established the distance of two feet and six inches presumably because he calculated that said distance would be enough to prevent damage. That distance* [...] *must always be observed* [...] *hence one cannot argue* [...] *that in order to rely on the application of the legal distance of two feet and six inches, one must first prove the existence of damage, as this is not stated by the law*'.

[13] *Salvatore Vella vs Felice Camilleri*, Civil Court (First Hall) 29 March 1957 XLI.ii.iii.954.

[14] '*the distance constitutes a legal servitude for private utility; and therefore the same distance can be modified, and waived when necessary*'.

[15] 481/2011/1 *Philip Bonello et vs Gaetano Tabone et*, Court of Appeal 25 November 2016, p. 12.

[16] '*[It] turns out that the extinction of the right of servitude does not occur only after the lapse of thirty years,* [...], *among other methods of extinction there is also the wavering of the right which may be express or tacit.*'

[17] Kamra tal-Periti, *A Modern Building & Construction Regulation Framework For Malta* (2020) 29.

existed no modern equipment and machinery to carry out such deep excavations. The mid-20th century witnessed a surge in construction that led to the invention of modern, specialised equipment used in large-scale excavations, heralding new practices and methods of work, and consequently, greater risks and liabilities.

In 2015, excavation-related risks were exacerbated with the introduction of the Development Control Design Policy, Guidance and Standards 2015 (DC 15) published by the Planning Authority. The policy stipulates that 'in new developments, no part of the dwelling is to have a separate habitable floor beneath street level [...] for residential purposes'.[18] The Policy prohibited Basement Type 2 and 3 shown in Figure 1, solely allowing basements designed entirely below pavement level - marked Basement Type 1, necessitating deeper excavations and correspondingly, increased risks.

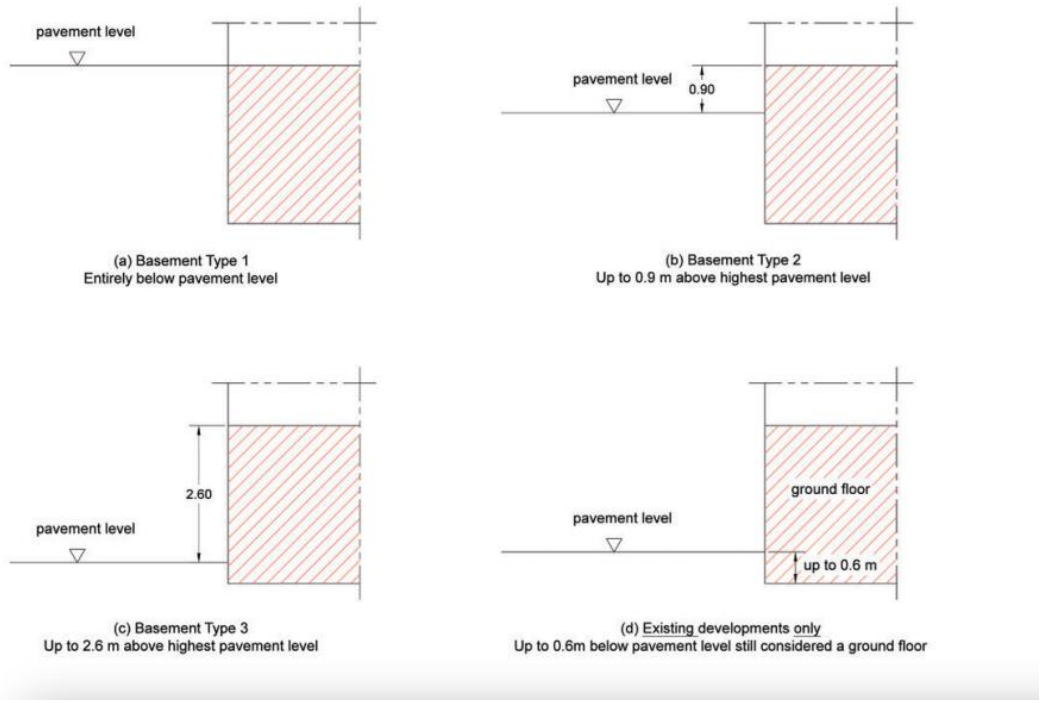

Figure 1. Basement Types

Unfortunately, these developments have outpaced the current building regulatory framework.

2.1 Modern challenges and methods undermining the Civil Code provision

The legal distance set out in the Civil Code does not consider or address certain risks. Where, for instance, a party undertakes excavation works at a distance of seventy-six centimetres from the party-wall, adhering to the statutory distance. It is very likely that, at a certain point, the neighbouring

[18] Malta Environment and Planning Authority (MEPA), *Development Control Design Policy, Guidance and Standards 2015* (Policy 38, 2015) 117 <https://ias.com.mt/wp-content/uploads/2018/04/dc2015-reduced-in-size.pdf>.

tenement will likewise excavate his land, leaving a seventy-six centimetre distance from the party-wall. Here, one must consider that the law[19] further stipulates that the thickness of a party-wall should not be less than thirty-eight centimetres. However, the owners of contiguous tenements may agree to a lesser thickness, most often that of twenty-three centimetres. In such case, the overlying structures - potentially bearing the weight and pressure of multiple storeys - would be borne by a hundred and seventy-five centimetre free-standing rock outcrop between both buildings (76 centimetres + 23 centimetres (thickness of party wall) + 76 centimetres). As a result, the foundation is often rendered unstable and fragile, prone to collapse, even though the statutory minimum distance for excavations would have been respected in both tenements.

The archaic provision may further hinder methodologies which, in certain instances, would yield safer excavations, provided such methods are supported by accurate calculations and correct execution by the parties involved. It is submitted that the methodologies discussed hereunder, namely 'shoring' and 'underpinning', allow for safer excavations where the foundational fabric is not sufficiently stable.

2.2 Excavation and methods adjacent to party walls

2.2.1 Shoring

'Shoring' is an earth-retaining structure constructed prior to excavation and designed to prevent the movement of soil and cave-ins. It consists in piles ploughed into the ground adjacent to the party-wall, as per Figure 2 hereunder. The technique is typically proposed for clay soils.

[19] Civil Code, Chapter 16 of the Laws of Malta, Article 407.

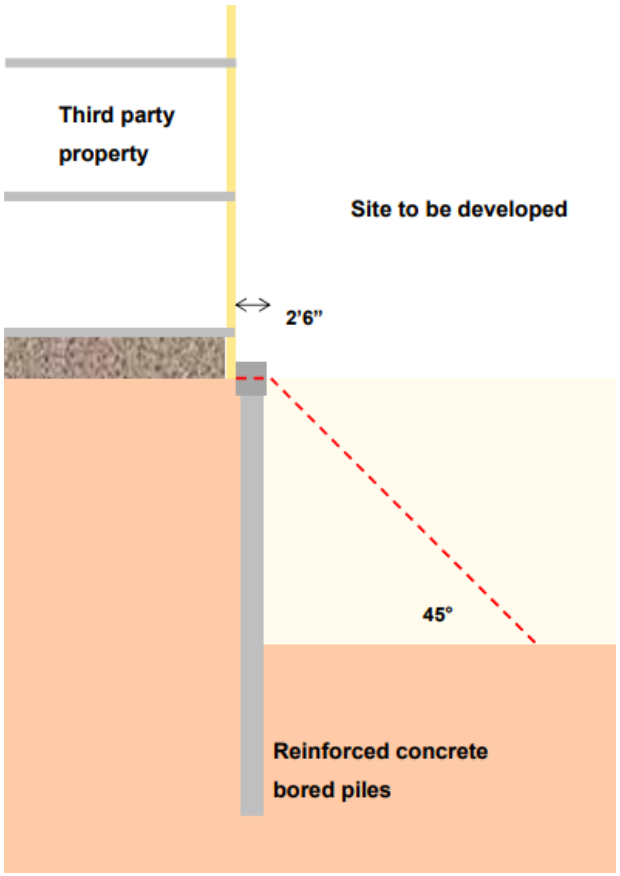

Figure 2. Shoring

Ground anchors are installed underground to retain shoring structures providing lateral support as shown in Figure 3.

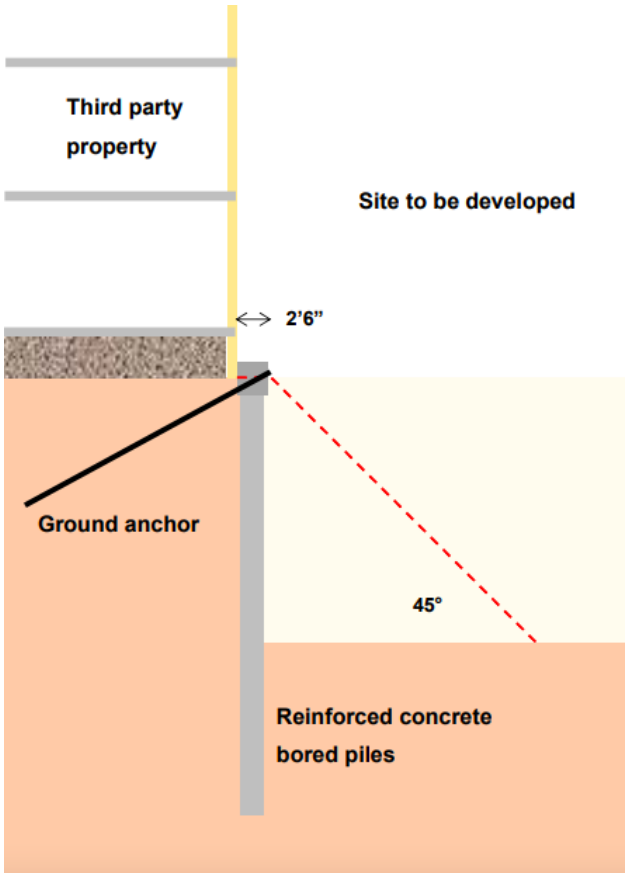

Figure 3. Ground Anchor (Shoring)

2.2.2 Underpinning

Another construction technique is 'underpinning'. Underpinning is the process of strengthening the existing foundation of a structure by reinforcing concrete columns in niches beneath the adjacent property prior to excavation. As seen in Figure 4, the friable rock beneath the party-wall is replaced with a concrete wall or masonry block-work.

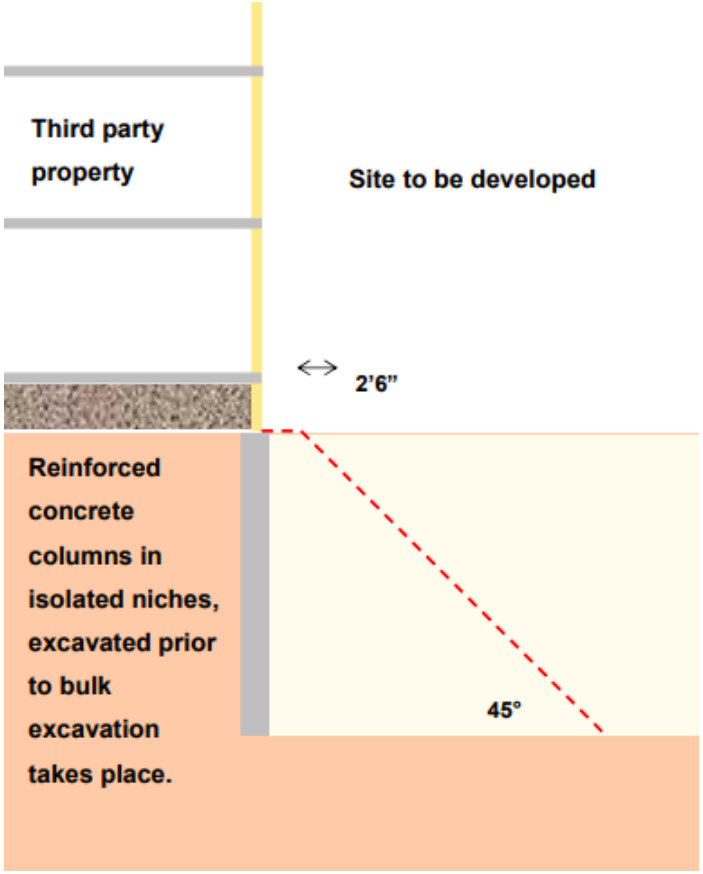

Figure 4. Underpinning

As civil law stands today, the foregoing methods aimed at preserving the structural integrity of building structures necessarily require an agreement between the owners of the neighbouring tenements expressed in a public deed. This is indirectly noted in the Avoidance of Damage to Third Party Property Regulations (L.N. 136 of 2019), which state that: '*If agreement is reached with the neighbouring third parties within the affected zone, boreholes shall be drilled, inclined, from within the site that is to be excavated, into the ground beneath the neighbouring third party properties*'.[20]

Maltese Courts do not tend to look favourably at the aforementioned techniques, particularly where the owner of the adjacent tenement does not renounce to the legal easement of distance for excavation next to the party-wall. The Court discussed the said construction methods in *Angelo Cutajar et vs Mark Vella et*[21] wherein it referred to the aforementioned technique of underpinning: '*[M]inkejja illi bil-progress xjentifiku, hemm metodi sabiex isir tali skavar, b'eliminazzjoni tad-distanzi fuq spjegati, dan jista' jsir biss b'irfied speċjalizzat b'concrete steel structures mqiegħda waqt li qed isir l-*

[20] Avoidance of Damage to Third Party Property Regulations, S.L. 513.06, Fifth Schedule.

[21] 1853/2014/1 *Angelo Cutajar et vs Mark Vella et*, Civil Court (First Hall) 22 December 2014, 14.

iskavar sabiex il-pedamenti tal-proprjetà adjaċenti jiġu rinforzati'.[22]

The reluctance of the Courts to accept and approve of such methods was debated in *Francis Azzopardi et vs Carmen Camilleri*.[23] The Civil Court justified its disapproval as follows: '*[L]i kieku din il-Qorti kellha tilqa*' *din l-eċċezzjoni tal-konvenuta jkun ifisser li persuna wara li tkun ivvjolat dispost tal-liġi volontarjament, tista*' *imbagħad tgħaddiha lixxa billi ma tiġix ordnata tikkonforma ruħha mal-liġi. Dan żgur mhux l-ispirtu tal-liġi*'.[24]

Likewise, in *Carmel u Maryanne konjugi Agius vs Gozo Consolidated Building Contractors Ltd u Ignatius Attard*,[25] the defendants excavated within the legal distance and claimed that the action was taken to ensure stability of both structures. The report of the legal expert appointed by the Court put forth the following proposal: '*Jekk din l-Onorabbli Qorti tiddeċiedi illi l-importanti huwa illi l-istruttura tal-bini tal-attur tkun salvagwardjata, irrispettivament mid-distanza ta*' *76cm, allura jista*' *jsir l-iskavar tal-blat rimanenti sa taħt il-pedamenti tal-attur, u jsir reinforced concrete wall taħt il-ħajt diviżorju*'.[26]

The Court however, expressed its reservations to the foregoing proposal and held:

> *Hu minnu li l-Building Industry Consultative Council għamlet rapport fejn saret proposta li din ir-restrizzjoni titneħħa soġġett għal ċertu miżuri li għandhom jittieħdu mill-iżviluppatur, però sal-lum għadha m'għaddiet l-ebda liġi f'dan is-sens. Il-fatt li wara dawn is-snin kollha ma jirriżultax li żviluppat xi ħsara fil-proprjetàtal-attur fejn sar tħaffir kontra dak li jiddisponi l-Artikolu 439 tal-Kodici Ċivili, ma jfissirx li b'daqshekk il-Qorti tista*' *tmur kontra dak li tgħid il-liġi* […] *Altrimenti l-Qorti stess tkun qiegħda tikser il-liġi. Għalhekk din il-Qorti ma tista*' *qatt taddotta t-tieni suġġeriment magħmul mill-perit tekniku.*[27]

As can be seen from these pronouncements, the Courts seem to consider themselves constrained not to approve of the earth-retaining techniques, to give effect to the absolute and categoric easement of distance for excavations

---

[22] '*although with scientific progress, there are methods for carrying out such excavation, by eliminating the distances explained above, this can only be done by virtue of specialised support with concrete steel structures placed during the excavation so that the foundations of adjacent property are reinforced*'.

[23] 117/2010 *Francis Azzopardi et vs Carmen Camilleri*, Civil Court (First Hall) 15 May 2015, 15-16.

[24] '*If this Court were to uphold the defendant's objection, it would mean that a person, after having voluntarily violated a provision of the law, may then be exonerated by not being ordered to comply with the law. This is definitely not the spirit of the law*'.

[25] 176/2000/1 *Carmel Agius et vs Gozo Consolidated Building Contractors Ltd et*, Court of Magistrates (Gozo, Superior), 14 December 2007, 5-7.

[26] '*If this Honourable Court decides that the safeguarding of the plaintiff's building structure takes precedence, regardless of the distance of 75cm, then excavation of the remaining rocks up to the foundations of the plaintiff can be carried out, and a reinforced concrete wall is constructed under the party wall* '.

[27] *It is true that the Building Industry Consultative Council has made a report proposing that this restriction be lifted subject to certain measures to be taken by the developer, but to date no such law has been passed. The fact that after all these years it does not appear that any damage has been done to the plaintiff's property where excavation was carried out contrary to the provisions of Article 439 of the Civil Code, does not mean that the Court may go against what the law says* […] *Otherwise the Court itself will be breaking the law. Therefore, this Court can never adopt the second suggestion made by the technical architect*'.

next to the party-wall.

2.3 Proposals for amending Article 439 of the Civil Code

The easement set out in Article 439 of the Civil Code is now archaic and inadequate. The provision overlooks the varying qualities of Maltese rocks and the relative soil mechanics and ground formation such as fissured rock, soft rock, or clay. It is the author's view that the provision needs to be amended in a manner such that buildings are designed and constructed as self-standing, whilst making the necessary allowances for the stability of nearby structures and taking public safety as key consideration throughout.

A potential remedial measure would be to retain the statutory compulsory minimum distance for solid ground conditions, and make the necessary exemptions where the underlying material consists of fissured rock, soft rock, or clay. Where such specialised treatment is required, the relevant provision may stipulate that the project architect requests an exemption from the competent authority such as the Building and Construction Authority, who - at its discretion - may authorise the foregoing methods of 'shoring' and 'underpinning' without requiring the express consent of the owners of the adjacent tenement.

Although the law allows for the renunciation of this easement, one must necessarily consider that obtaining consent to execute the said methods is not guaranteed, irrespective of whether the implementation of such methods will prove safer for both parties. In this manner, the decision on the feasibility of the proposed works would be entrusted to the competent Authority as opposed to the third-party owner of the neighbouring tenement. This proposal must, however, be subject to fair administrative processes during which the affected parties may voice their concerns and motivate their objections.

Furthermore, as an added precaution, the developer who excavates within the statutory distance may be required to erect a self-standing party-wall that is structurally independent from that of the adjacent tenement as an added precaution. Not only will this measure ensure the stability of independent structures, but may also prove effective to avoid disputes which commonly arise between owners of neighbouring tenements over a party-wall which is rendered common.

3. The Interplay between the Civil Code, the Code of Police Laws and the Building Regulation Act

The above-mentioned 'shoring' and 'underpinning' techniques necessarily involve the concerted action of diligent developers, knowledgeable architects, competent and vigilant contractors, and skilled tradesmen.[28] It is the author's view that the said service providers require compulsory adequate

[28] Building Industry Technical Committee, Internal Discussions of the Committee (2020) 29.

training and continuous professional development, licensing and certification.

3.1 Training and licensing of service providers within the sector

The Periti Act (Chapter 390 of the Laws of Malta) delineates the academic requirements necessary for obtaining the professional warrant of an architect and civil engineer in conformity with European Directive 2005/36/EC.[29]

Despite assuming the high-risk responsibility of the execution of works on the instruction of the project architect, the contractor is not subject to any licensing requirements, meaning that any individual, irrespective of training and technical knowledge, may carry out the work of a contractor.

Consultations on a Building and Construction Authority Bill, led by the Maltese Parliament and set to include the registration and licensing of building contractors, were halted before the 2022 general elections, however, discussions on new regulations for the possession of a licence are currently in course on the initiative of the Building Industry Consultative Council.[30]

3.2 Qualifications of a site technical officer (STO)

The Avoidance of Damage to Third Party Property Regulations (L.N. 136 of 2019) introduced the figure of the 'Site Technical Officer (STO)', previously termed the 'site manager' under the preceding 'Avoidance of Damage to Third Party Property Regulations (L.N. 72 of 2013)'. The STO is defined as '*a person carrying out the duty or duties derived from the provisions of these regulations*'.[31] The Regulations establish that the STO is responsible for on-site enforcement of the method statement and adherence to the Regulations. Moreover, the STO is to be present whenever decisions '*that influence the risk of damage to third party property or injury to persons that may be caused by the works*' are undertaken.[32]

The most recent amendments to the Regulations by virtue of Legal Notice 180 of 2019 stipulate that the contractor is tasked with the appointment of an STO, who is subsequently accepted by the project architect. Pursuant to the amended Third Schedule, the STO must be qualified as a warranted architect or otherwise possess a Bachelor's degree in Engineering.[33] This implies that an electrical or mechanical engineer may also occupy the position of an STO. This amendment was heavily criticised by the Malta Association of Professional Engineers (MAPE), which described the decision, on the part of the legislator, as uncovering the 'utter lack of understanding of the Authorities, of these specific engineering disciples',[34] on the premise that the

[29] Periti Act, Chapter 390 of the Laws of Malta, Article 5.

[30] Kamra tal-Periti, 'PR06/21 | Human Decency Before Profit' (Kamra tal-Periti, 2021).

[31] Avoidance of Damage to Third Party Property Regulations, S.L. 513.06, Regulation 3.

[32] ibid.

[33] Avoidance of Damage to Third Party Property Regulations, S.L. 513.06, Third Schedule.

[34] Times of Malta, 'Using Engineers as Site Technical Officers Shows Utter Lack of Understanding' *Times of Malta* (Malta, 2

field of an electrical or mechanical engineer is, in many cases, distinct and unrelated to that of an architect and civil engineer.

It is thus being proposed that the eligibility criteria to assume the role of an STO be narrowed down and limited only to architects and persons in possession of a degree or equivalent certification in construction and civil engineering, as the persons possessing the necessary knowledge and skill required to enforce building and construction method statements and Regulations on site.

3.3 Contradicting provisions and ill-defined duties and responsibilities

The newly-introduced figure of the STO, one could argue, has exacerbated the issue of ill-defined duties and responsibilities of the various stakeholders within the industry. At present, Article 1638 of the Civil Code, which holds the project architect and the contractor jointly liable for ensuring the structural integrity of buildings for a period of fifteen-years, has not been duly amended to include the person of the STO. At this juncture, the Chamber of Architects rightly warned that, '[a]ny regulation that purports to contradict the Civil Code is only contributing to the confusion that has characterised the industry in the last decades'.[35]

The need for legislative clarification in this regard has also been met with concordant calls from the judiciary. In the recent appeal of *Il-Pulizija vs Roderick Camilleri u Anthony Mangion*,[36] two architects - the latter serving as an STO - were found guilty of negligence, causing the collapse of the neighbouring building in Santa Venera, and the premature death of the occupier. The defence raised the issue of regulatory uncertainty with regard to the role of the STO and argued: '*r-rwol li kien jirrikopri kien milqut minn leġislazzjoni konfuża u inadegwata li fi kwalunkwe każ ma kienetx tikkontempla responsabilità penali fil-każ ta' xi nuqqasijiet mill-figura professjonali li huwa kien jirrikopri*'.[37]

The Court in *Il-Pulizija vs Robert Sant*[38] also reiterated the urgency for identifying clear lines of responsibilities and liabilities in the interest of public safety, and rightly sustained, '*fl-inċertezza jinbet il-kaos*'.[39]

One may further point to the STO's conflict of interest. The STO receives remuneration from the contractor while concurrently bearing the duty of monitoring the contractor and reporting any misdeeds to the relevant authorities, where necessary.

August 2019) <https://timesofmalta.com/articles/view/using-engineers-as-site-technical-officers-shows-utter-lack-of.726292> accessed January 27 2022.

[35] Kamra tal-Periti, 'PR17/19 | Kamra tal-Periti Calls for Clear Responsibilities in the Interest of Public Safety' (Kamra tal-Periti, 2019).

[36] 146/2020/1 *Il-Pulizija vs Roderick Camilleri et*, Court of Criminal Appeal (Inferior) 28 July 2022, 30.

[37] *' the role which he was undertaking was affected by confusing and inadequate legislation that in any case did not contemplate penal liability in the event of any shortcomings that he was undertaking'.*

[38] 599/2015*Il-Pulizija vs Robert Sant*, Court of Magistrates (Criminal Judicature) 4 November 2019 (subject to appeal).

[39] '*chaos yields uncertainty*'.

In the light of the foregoing, many deliberations have been made as to the retention or otherwise of the STO within the building and construction framework. In fact, the Chamber of Architects opines that the figure of the STO should be abolished in view of ensuring clarification of the responsibilities involved on construction sites.[40] The Building Industry Technical Committee explored the option of re-dimensioning the role of the STO, to the extent that it provides the necessary oversight required on-site and acts as a point of reference for all parties involved in the project.

3.4 The effectiveness of insurance cover in light of exclusions in insurance policies

The Avoidance of Damage to Third Party Property Regulations (L.N. 136 of 2019) further require that the developer grants security in favour of third parties through a compulsory indemnity insurance for the payment of damages covering, '*any single occurrence or recurrence of damages sustained by third party property, disability to persons or death as a result of the construction works or activity being undertaken by the developer and the contractors working on the site*'.[41] Moreover, the developer is required to submit a bank guarantee equivalent to any excess stipulated in the insurance policy.

An insurance cover comes into effect when any one or more of the insuring clauses are satisfied in the event of a covered risk. Provided that a risk covered by the said policy has occurred, the second test for the applicability of the insurance cover is to determine whether any of the policy exclusion rules apply.

Some standard exclusions include: damage to or loss of any building structure due to vibration or weakening of support; foreseeable loss or damage; liability resulting from failure on the part of the insured to perform his duties as set out in the contract of works; damage to or loss of any property directly or indirectly consequent upon settlement cracks; the costs of loss prevention or minimisation measures which become necessary during the period of insurance; and loss or damage resulting from total or partial cessation of work or the retarding, interruption or cessation of any operation. This effectively means that the third party, notwithstanding the measure and protection seemingly afforded to it by the law, may potentially remain uncompensated, thereby having to resort to judicial remedies if the developer fails to make good the damages caused.

As it seems therefore, the effectiveness of the provision requiring insurance cover in favour of the third-party, is considerably undermined when considering the numerous exclusions included in policies.

It is submitted that, instead of adding unnecessary costs and bureaucracy

[40] Kamra tal-Periti, *A Modern Building & Construction Regulation Framework For Malta* (2020), 6.

[41] Article 6, Avoidance of Damage to Third Party Property Regulations, S.L. 513.06, Article 6.

to the process by virtue of the said compulsory insurance cover, it would be more beneficial to focus on creating a system of adequate monitoring and judicial enforcement exercised in a sound, efficient, and timely manner.

3.5 Enforcement

As afore-stated, the proposed measures must be supported by effective enforcement to ensure adequate and accountable delivery of the law. The Avoidance of Damage to Third Party Property Regulations (L.N. 136 of 2019) is often criticised in that, despite setting 'the blueprint for improvement',[42] its effectiveness is considerably diminished upon the realisation that some of its more radical requirements are not being monitored or enforced in practice.

The State should regularly devise adequate and effective checks and balances covering all stages of the building and construction process. The recent establishment of the Building and Construction Authority and the Building and Constriction Tribunal as the central enforcing agencies, coupled with the work of the Planning Authority enforcement unit and the Occupational Health and Safety Authority (OHSA), are surely a step in the right direction in this regard.

4. Conclusion

The objective of this work was to demonstrate that the current building and construction legislative framework is disjointed and inadequate, and as a result, does not sufficiently ensure public safety. Despite the evident factual interplay between the afore-mentioned public and private law regimes regulating the building and construction industry, there seems to be no apparent legislative link. The common sentiment is that the stakeholders and third-party owners of adjacent tenements have to shoulder much of the responsibility of the State to regulate buildings and construction works. This point was made evident in the afore-cited Criminal Appeal of *Il-Pulizija vs Roderick Camilleri u Anthony Mangion*,[43] where the defence argued that they were, '*vittmi ta' sistema ta' regolamentazzjoni difettuża u qed ibatu l-konsegwenzi għan-nuqqasijiet ta' din is-sistema*'.[44]

In this view, a system of clear, up-to-date, civil and administrative rules, established through researched practices and standards, adequate training, education, and enforcement, are of utmost urgency and importance.

[42] Building Industry Technical Committee, Internal Discussions of the Committee (2020), 22.

[43] 146/2020/1 *Il-Pulizija vs Roderick Camilleri et*, Court of Criminal Appeal (Inferior) 28 July 2022.

[44] '*victims of a defective regulatory system and are suffering the consequences of the shortcomings of the system*'.

OLJ

GHSL Online Law Journal